Laborers International Union of North America, Local Union 1184 *and* High Light Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 440, AFL–CIO. Case 21–CD–677

April 29, 2010

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. High Light Electric, Inc. (the Employer) filed a charge on August 11, 2009, alleging that the Respondent, Laborers International Union of North America, Local Union 1184 (Local 1184), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to continue to assign certain work to employees it represents rather than to employees represented by International Brotherhood of Electrical Workers, Local 440, AFL–CIO (Local 440). The hearing was held on October 21 and 22, 2009[1] before Hearing Officer Cecelia Valentine. The Employer, Local 1184, and Local 440 filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error.[2] On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a California corporation, is a contractor engaged in the construction industry with a principal place of business in Riverside, California. During a 12-month period preceding the hearing, the Employer purchased and received goods and services valued in excess of $50,000 directly from points outside the State of California. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Locals 1184 and 440 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer specializes in electrical contractor work and installs traffic control devices and utilities on public works roadway projects in Riverside County and several other Southern California counties. Since 1999 or 2000, the Employer has been signatory to the Master Labor Agreement (Laborers Agreement) between the Associated General Contractors of Southern California and the Southern California District Council of Laborers, which includes Local 1184. The most recent Laborers Agreement was effective from July 1, 2006 through June 30, 2009, and continues on a year-to-year basis thereafter.

On March 22, 2007, the Employer signed a Letter of Assignment confirming its assignment to employees represented by Local 1184 of the following work:

> The installation of all conduit, boxes, foundations, vaults, manholes, HDD (horizontal directional drilling) and any method, fiber optics, concrete, asphalt, digging, trenching, shoring, staging and lay out of materials, attaching, core drilling, saw cutting, anchoring devices, back fill, pot holing, mandreling and concrete encasement of duct banks.

Pursuant to a September 2007 letter of assent, the Employer has been signatory to the Intelligent Transportation Systems Agreement (ITS Agreement) between Local 440 and the Southern Sierras Chapter of the National Electrical Contractors Association (NECA). The most recent agreement was effective from November 1, 2006, through August 31, 2009, and continues on a year-to-year basis thereafter. Section 2.34 of the ITS Agreement sets forth the scope of work, and provides that the agreement is intended to cover:

> electrical work on public streets and freeways, above or below the ground. All work necessary for the installation, maintenance, renovation, repair or removal of Intelligent Transportation Systems, CCTV, Street Lighting and Traffic Signal work or systems, whether overhead; underground, or on bridges, including dusk to dawn lighting installations and ramps for access to or egress from freeways. Intelligent Transportation Systems shall include all systems and components to controls [sic], monitor and communicate with pedestrian or vehicular traffic included [sic] but not limited to installation, modifications, removal of all Fiber Optic Systems, Direct Interconnect and Communication Sys-

[1] All dates are in 2009 unless otherwise indicated.

[2] We find no merit in Local 440's argument that it should have been permitted to litigate whether California prevailing wage laws require the Employer to pay electrician's wages for the work in dispute. As the Board recently stated in rejecting a similar argument, "Our determination of the merits of the dispute decides only which group of employees is entitled to perform the work, not the wages that the Employer must pay them for the work." *IBEW Local 42 (Henkels & McCoy, Inc.),* 354 NLRB No. 78, slip op. at 4 (2009).

Local 440 contends that the hearing officer's rulings demonstrated bias against it. After a careful review of the record and the hearing officer's rulings, we find no merit in Local 440's contentions.

> tems, Microwave Data, Video, Camera Monitoring Systems, Microwave Detection Systems, Infrared and Sonic Detection Systems, Solar Power Systems, Highway Advisory Radio Systems, Highway Weight and Motion Systems, Etc. . . . The excavating, setting, leveling and grouting of pre-cast manholes, vaults, pull boxes, including ground rods, or grounding system and rock necessary for leveling and drainage, as well as the pouring of a concrete envelops [sic], if needed.

The Employer employs approximately 50 to 75 employees in any year and at times works with composite crews of laborers represented by Local 1184 and electricians represented by Local 440. It has consistently assigned work described in the Letter of Assignment to employees represented by Local 1184.

On June 29 and 30, the Employer received letters from Local 440 alleging that the Employer was violating the ITS Agreement by assigning electrical work to employees not represented by Local 440 at four of the Employer's jobsites in Riverside County. On July 2, the parties met to discuss the dispute. Thereafter Local 440 filed a contractual grievance, and the Employer notified Local 1184 about the dispute.

On July 8, Local 1184 sent a letter to the Employer demanding that the Employer "maintain your assignment of your 2007 letter to the Laborers Union" and noting that "[i]f you reassign this work to the IBEW, or any other craft, the Laborers Union will take immediate action, including economic action and withhold labor, to ensure the proper assignment of work to Laborers." On August 11, the Employer filed 8(b)(4)(D) charges against Local 1184. On September 15, the Board issued the notice of hearing under Section 10(k).

In the meantime, Local 440 withdrew its contractual grievance and on September 22 referred the jurisdictional dispute to an arbitrator under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Settlement Plan). A hearing was held on September 29. Prior to the hearing, the Employer denied that it was bound by the Settlement Plan. It did not participate in the hearing. Representatives for IBEW and Laborers International did participate. After the hearing concluded, the arbitrator issued a decision in which he found that all parties, including the Employer, were bound to the Settlement Plan and that the Settlement Plan constituted the sole forum for resolution of the jurisdictional dispute. The arbitrator ordered the Employer to withdraw the charge in this 10(k) proceeding. The arbitrator did not decide the merits of the jurisdictional issue. The Employer did not comply with the arbitrator's order and, as previously indicated, the parties proceeded to a 10(k) hearing.

B. Work in Dispute

As clarified by the parties at the hearing, the work in dispute includes the installation of conduit, boxes, vaults, fiber optics, attaching devices, mandreling, and concrete encasement of duct banks.

C. Contentions of the Parties

The Employer and Local 1184 contend that there are competing claims for the work in dispute, there is reasonable cause to believe that Local 1184 violated Section 8(b)(4)(D) and that there is no agreed-upon voluntary method to adjust the dispute because the Employer is not bound to the Settlement Plan. On the merits of the dispute, the Employer and Local 1184 contend that the factors of certifications and collective-bargaining agreements, employer preference, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations favor awarding the disputed work to employees represented by the Laborers. The Employer and Local 1184 seek a broad jurisdictional award beyond the four jobsites in Riverside County which gave rise to this proceeding.

Local 440 contends that the Board lacks jurisdiction under Section 10(k) because all parties, including the Employer, are bound to the terms of the Settlement Plan as the exclusive method for resolving their jurisdictional dispute. Local 440 further contends that the dispute here was manufactured so that the Employer could abrogate the ITS Agreement. Local 440 does not address how the Board should rule on the merits of the dispute should it find that it has the authority to act under Section 10(k). Local 440 does oppose the request by the Employer and Local 1184 for a broad award.[3]

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute.[4] For the reasons stated below, we

[3] Local 440's counsel left the hearing while it was still in progress and did not present witnesses in support of Local 440's contentions.

[4] See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

find that this dispute is properly before the Board for determination under Section 10(k).

At all relevant times, both Local 1184 and Local 440 have claimed the disputed work for employees they represent. Furthermore, after learning of Local 440's claim, Local 1184 threatened the Employer with "immediate action, including economic action and withhold labor" should the Employer reassign the disputed work. Such language constitutes a threat to use proscribed means in furtherance of a claim to the work in dispute. Although Local 440 contends that Local 1184 and the Employer "plotted" to create a work dispute where none actually existed, there is no evidence that Local 1184 did not intend its threat seriously. In the absence of such evidence, a charged party's use of language that, on its face, threatens economic action is sufficient to find reasonable cause to believe that Section 8(b)(4)(D) has been violated.[5]

We also find that no agreed-on method exists for voluntarily resolving the dispute. It is well settled that all parties to the dispute must be bound if an agreement is to constitute "an agreed method of voluntary adjustment." *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005). In order to determine if the parties are bound, the Board carefully scrutinizes the agreements at issue. See, e.g., *Elevator Constructors Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1209–1210 (2007); *Sheet Metal Workers Local 292 (Gallagher-Kaiser Corp.)*, 264 NLRB 424, 428–430 (1982).

It is apparently undisputed that Local 1184 and Local 440 are bound to the Settlement Plan through their respective parent International unions. Local 440 contends that the Employer is similarly stipulated to the Settlement Plan through its membership in, and delegation of bargaining authority to, the Southern Sierras Chapter of NECA. We find, however, that Local 440 has failed to establish, based on the record in this proceeding, that the Employer is bound under the Settlement Plan.

Local 440 submitted into evidence a copy of the arbitrator's decision holding that the Employer is bound to the Settlement Plan. But the arbitrator's decision itself cannot bind the Employer to the Settlement Plan, inasmuch as the Employer was not a party to the September 29 proceeding and did not agree to be bound by its results.[6] Furthermore, the documents on which the arbitrator based his decision were not put into evidence in this proceeding, and no representative of NECA testified in this proceeding. The ITS Agreement also does not support Local 440's claim that the Employer is bound under the Settlement Plan, given that it makes no mention of the Settlement Plan.[7] Instead, alleged violations of the work assignment and scope of work provisions of the ITS Agreement are subject to resolution through a three-step grievance procedure, culminating in a "final and binding" decision by the Council on Industrial Relations for the electrical contracting industry.

Based on these facts, we find reasonable cause to believe that there are competing claims to the disputed work, that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon voluntary method to adjust the dispute. Accordingly, we find that Section 10(k) is applicable, and that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting),* 364 U.S. 573, 577 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Collective-bargaining agreements

Both Local 1184 and Local 440 have separate binding contracts with the Employer. Language in each contract arguably covers the work in dispute. Therefore, the factor of collective-bargaining agreements does not favor an award to employees represented by either union. See *Operating Engineers Local 318 (Kenneth E. Foeste Masonry),* 322 NLRB 709, 712 (1996).[8]

2. Employer preference, current assignment, and past practice

The Employer prefers that the work in dispute continue to be assigned to employees represented by Local 1184 in accord with a consistent past practice dating back several years and memorialized in the Employer's March 22, 2007 Letter of Assignment. There is no evidence that the Employer has previously assigned the

[5] *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004).

[6] E.g., *Elevator Constructors Local 2 (Kone, Inc.),* supra at 1209.

[7] The letter of assent binding the Employer to the ITS Agreement and vesting bargaining authority in the Southern Sierras Chapter of NECA also makes no reference to the Settlement Plan.

[8] The Employer entered into the Laborers Agreement and the ITS Agreement under the provisions of Sec. 8(f) of the Act that permit parties in the construction industry to establish bargaining relationships without a showing of majority employee support for the union. Prior to the hearing in this case, the Employer recognized Local 1184 as a majority representative under Sec. 9(a), based on a card showing of majority support. The change in Local 1184's representative status has no effect on our determination of the merits of the dispute.

work in dispute to employees represented by Local 440. We find that the factors of employer preference, current assignment, and past practice favor awarding the disputed work to employees represented by Local 1184.

3. Area practice

Pat Jeffries, a manager for Doty Brothers Equipment Company, testified that most of his company's work occurred "from Northern California down to Southern California," and that his company performed the same type of "dry utilities" work as that of the Employer, although in the private sector rather than in public works. Jeffries further testified that work similar to that described in the Letter of Assignment was performed by Laborers-represented employees for Doty Brothers.

Michael Rodriguez, director of industrial relations for the Associated General Contractors of California, testified that he was familiar with the assignment of work among contractors in Southern California concerning the type of work performed by the Employer, and that this work was regularly assigned to Laborers-represented employees. Rodriguez also testified that he was unaware of any exceptions to this assignment in Southern California.

There is no evidence that any employer in the Southern California area has assigned work similar to that in dispute to employees represented by Local 440 or to any group of electricians. Accordingly, we find that the factor of area practice favors an award of the disputed work to employees represented by Local 1184.

4. Relative skills and training

Local 1184 presented evidence that Laborers-represented employees receive training to perform most aspects of the work in dispute in courses provided to apprentices and journeymen by the Laborers Training and Retraining Trust of Southern California. The tasks of mandreling and installation of fiber optics are learned on the job. The Employer's president, Erwin Mendoza, testified that he valued the Trust's training programs, which he perceives to be superior to IBEW training programs for the outside public works projects which the Employer traditionally contracts to perform. There is no evidence concerning the skills and training of employees represented by Local 440. Accordingly, we find that this factor favors an assignment of the work to employees represented by Local 1184.

5. Economy and efficiency of operations

Mendoza testified that it was preferable to have Laborers-represented employees perform the disputed work because "it doesn't break the efficiency or flow of the work as we're doing the work out there. It's burdensome for the contractor also to have electricians out there for an hour or two of work when the Laborers could perform all the work themselves as the day goes on . . . Laborers . . . multi-task quite a bit. And when you're out there in the street, since they do have training for . . . trench plates, traffic control, and excavation and shoring, you could virtually employ a Laborer out there to perform all the duties and work all in an eight-hour day as opposed to the amount of work that's consisted for an electrician to do."[9] Mendoza further testified that if he were required to assign the disputed work to IBEW-represented employees, he would not have a full day's work to give to Laborers-represented employees. He explained that he would "be employing an electrician to do all that work inefficiently, probably performing three hours worth of work in an eight-hour pay period if we were to just extract [the work in dispute] away from there. And I would have Laborers performing . . . five hours of work in an eight-hour pay period."

Local 440 took no position on the various award factors and presented no evidence on economy and efficiency of operations. Based on the uncontroverted testimony presented by the Employer and the evidence showing that none of the disputed work required the skills or training of an electrician, we find that the factor of economy and efficiency of operations favors awarding the disputed work to employees represented by Local 1184.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 1184 are entitled to continue performing the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment and past practice, area practice, relative skills and training, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Local 1184, not to that labor organization or to its members.

Scope of Award

"Normally, [Section] 10(k) awards are limited to the jobsites where the unlawful [Section] 8(b)(4)(D) conduct occurred or was threatened." *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 546 (2004). However, the Employer and Local 1184 seek an award encompassing the Employer's operations in 11 Southern California counties covered by the Laborers Agreement.

The Board has customarily declined to grant an area-wide award in cases such as this in which the charged party represents the employees to whom the work is

[9] Smith corroborated Mendoza's testimony on the efficiency of contractors having a uniform policy of assignment. Smith testified that contractors thereby accomplish "[e]fficiency, cost, production where you can take one guy that's multi-task and move him from one thing to another. You get your production going. You don't have to stop in the middle of something and switch to put someone else in there."

awarded and to whom the employer contemplates continuing to assign the work. E.g., *International Union of Elevator Constructors, Local 2 (Kone, Inc.)*, supra at 1211–1212. Accordingly, in the circumstances of this case we find no warrant for granting a broad award. Therefore, the present determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of High Light Electric, Inc., represented by Laborers International Union of North America, Local Union 1184, are entitled to perform the installation of conduit, boxes, vaults, fiber optics, attaching devices, mandreling, and concrete encasement of duct banks on the Employer's jobsites at the 1900 block of Jurupa, the metro link station in Perris, the Magnolia and 15 Freeway interchange, and the La Sierra and 91 Freeway interchange in Riverside County, California.

Dated, Washington, D.C. April 29, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD